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WHEN WASHINGTON BENDS THE LAW

SENATOR DANIEL MOYNIHAN (D-N.Y.) on U.S. learning from its mistakes

I had one *pleasant* surprise last week. A friend at a big university called to report that the sophomore class in American government was being assigned the third chapter in a book called *Loyalties*, which I wrote a few years back. It sold in the hundreds—and what would you expect of a volume of action-packed chapters such as the one in question entitled "The Idea of Law in the Conduct of Nations"? Still, *someone* had read it, and all of a sudden the subject seemed relevant.

In outline, the subject is simple enough. Beginning with the Constitution itself, wherein Congress is given explicit power to "punish . . . offenses against the law of nations," the United States was, for the longest while, firmly committed to the position that relations between states should be governed by rules that are properly called law, the law of nations or international law in current usage.

Reagan working in the Oval Office

Our own conduct was not always impeccable, but, all things considered, the record is impressive. Just as important, it seemed to work. As we refined our principles and acted on them, the nation seemed to grow in power and influence. An international legal order, an extension of our government of laws here at home, seemed the greatest of boons to be desired for mankind and not just incidentally for America.

Somewhere, 10 or 20 years ago, the idea got lost. Early in 1979, during the Carter administration, I spoke on the subject at the Council on Foreign Relations in New York. I took as my central theme "the proposition that the current disorientation in American foreign policy derives from our having abandoned, for all practical purposes, the concept that international relations . . . can and should be governed by a regime of public international law."

"You cannot understand Washington"

The new administration took this withdrawal from the idea of law further and faster. You cannot understand Washington in the 1980s if you do not know that a great many of those new to office *actively* believed that abiding by the rules was giving in to the Soviets. *They* invade whom they want; if we don't, it's because we're wimps and losers.

Thus Nicaragua. When the administration first came to the Senate Intelligence Committee proposing to support the *contras*, the case was made that the Sandinistas were illegally interfering in the affairs of El Salvador. They were. The Intelligence Committee authorized arms interdiction and similar operations, stating that under international law we had the right and arguably the duty to provide them.

Then came the mining of the harbors. We had no right to do this. It was a specific violation of customary and treaty law. (And useless, of course—as if concussion mines would deter a Bulgarian ship captain with a hold filled with AK-47s.) Significantly, the Senate committee was *not* informed. When it all came out, as inevitably such a public event would come out, Barry Goldwater, as chairman, sent a blistering letter to William J. Casey at the CIA, saying he was [expletive deleted] and adding: "This is an act violating international law. It is an act of war."

Three days later, Robert C. McFarlane journeyed to Annapolis, where he told the Naval Academy Foreign Affairs Conference that the committee had been fully informed, as provided by law. This was calling Barry Goldwater a liar.

Two weeks later, Casey, in an honorable act, sent a handwritten note to Senator Goldwater admitting that the committee had not been kept adequately informed and apologizing for having indicated otherwise.

We tried to put the experience to some use. We reached an agreement with Casey providing that the committee be informed of "significant anticipated activities." It seemed to work. Dozens of exceedingly tender operations were passed along with never the slightest disclosure and, often as not, specifically increased budgetary support.

Save for Nicaragua. In his address, McFarlane made clear that we were not going to be bound by international law in our relations with that country. (When Nicaragua took us to the World Court, we refused to show up despite a clear undertaking to do so dating from our acceptance of the court's jurisdiction.) McFarlane explained that our actions there were the reflection of a new geopolitical strategy that went beyond the previous but "obsolescent" policy of "containment." In effect, he said the Soviets don't abide by law and so neither would we.

Not even our own law.

This is the choice that has been made for us, but have we really accepted it? I am much impressed with William F. Buckley's recent description of our policy toward Nicaragua as an "imposture."

"The imposture is that we 'recognize' a government whose overthrow we are subsidizing. The Neutrality Act forbids making war against a government we recognize."

This, he writes, accounts for "the anarchical events of the past year." Anarchy: The absence of law.

Can we not learn from all this? The real question about the events of the past year is not who broke the law, but who didn't mind, didn't care if the law was broken. It is not enough that the Soviets do it. We don't. And the law is a source of strength, not weakness. Or so we used to believe. Is it possible to hope that we might regain that belief as we seek to fathom the depths of the current lawlessness?